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No. 84-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL D. WRIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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December 27, 1984

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Point I

The government's brief fails to answer petitioner's claim that Thomas Puccio's conflict of interest in presenting the case to the grand jury deprived petitioner of his constitutional right to indictment by an impartial and independent grand jury.

The government's brief takes a largely *ipse dixit* approach to the issue whether petitioner was deprived of his right to indictment by an impartial and independent grand jury.

The essential point to be made is that the conflict of interest to which Thomas Puccio was subject, or his lack of disinterestedness, as the Court of Appeals preferred to put it, makes it impossible as a practical matter to know whether the grand jury's impartiality or independence was fatally compromised.

The government begins its argument with the assertion: "Petitioner does not dispute that he was found guilty by an

impartial and properly instructed jury on the basis of proof beyond a reasonable doubt adduced at a fair trial." (U.S. brief, p. 6). Petitioner wholeheartedly disputes this assertion although petitioner has not sought to bring the dispute to this Court.

It matters not, however, on the grand jury issue, whether or not the trial was flawed. If petitioner had been tried and convicted without his case having been presented to a grand jury, there can be no question he would be entitled to reversal of the conviction, even if the trial itself was entirely free from error.

The government's assertion that "there is no challenge to the grand jury's determination of probable cause," brief n. 6 at 7, is a similarly inadequate answer to the question whether petitioner was deprived of his right to indictment by an

impartial and independent grand jury. Petitioner has refrained from alleging a lack of probable cause in the presentation to the grand jury because petitioner knows too little about what was presented to the grand jury. The 3500 materials are fragmentary and inconclusive. More basically, even if the record showed probable cause, this would be insufficient assurance, indeed no assurance at all, that the evidence before the grand jury and its deliberations themselves were untainted by Thomas Puccio's conflict of interest.

The government's brief fails to rebut or even address petitioner's key contention: this case in legal effect should be equated to one in which there has been no grand jury action.

Point II

The uniqueness of the government's misconduct and lack of candor in this case is a reason for granting certiorari not denying it -- the result reached by the Court of Appeals creates an intolerable incentive for future governmental misconduct.

In arguing that the petition presents "largely fact-bound issues" that "do not warrant this Court's attention" (U.S. brief, p. 6) the government first misunderstands the reason for the petition's reference to the uniqueness of the facts and then by overly loose paraphrase attributes to the petition a statement it does not contain.

The petition points out that the facts in this case are unique and not likely to be repeated, (Pet. pp. 18-19), in order to make the point that if petitioner's claims are recognized as cognizable under §2255, as petitioner urges they should be, this would not

create a major inroad into the well-established limits on the kinds of claims that are cognizable under §2255. The government mischaracterizes this point by arguing as it does that because the facts of the case are unique the question presented is novel and doesn't warrant review (U.S. brief, p. 6).

Given the high volume of motions under §2255, an issue as to the kinds of claims that are cognizable has important precedential value. The issue whether petitioner should be required to clear a significantly higher hurdle under §2255 than he faced on the direct appeal with respect to the issue of prosecutorial misconduct which he raised on the direct appeal is also important because it ties into the question whether a proceeding under §2255 is of a civil or criminal character. The nature of a §2255 pro-

ceeding was the subject of sharp disagreement in U.S. v. Frady, 456 U.S.152, 178-79, 181-83 (Brennan J. dissenting).

The most significant aspect of the result reached by the Court of Appeals is that it creates an intolerable incentive for future misconduct by the government. This potential for future mischief is not lessened in any way by the uniqueness of the facts in this case. The result reached by the Court of Appeals teaches that if the government can gain affirmance on the direct appeal by withholding or misstating facts, its success will be immune from challenge on collateral attack under §2255. The Court of Appeals has fashioned a rule which encourages and rewards deficient performance by the government on direct appeal in every case no matter what the facts.

The government's brief, at p. 6, con-

tains the following passage, set forth exactly as it appears:

> Indeed, petitioner argues at length (see Pet. 20-26) that, while "the Court of Appeals spelled out with precision *** [the relevant] facts, it did not perceive the[ir] full [importance]" (id. at 20).

The statement in petitioner's brief that the government is purporting to quote actually reads as follows, at p. 20:

> "While the Court of Appeals spelled out with precision these missing facts, it did not perceive the full lack of candor in the presentation of facts by David Trager while he was United States Attorney and thereafter."

The petition was stressing the importance of the government's "full lack of candor" as a reason why petitioner's claims should be cognizable under §2255 and as justification for the exercise of the Court's supervisory power. The petition was not as the government's paraphrase would suggest arguing that the

Court of Appeals failed to appreciate the full importance of the facts that the government withheld or misstated on the direct appeal. The Court of Appeals did appreciate the full importance of these facts. What the Court of Appeals failed to appreciate and to address was the full extent of the government's lack of candor and its misbehavior at all stages of this case. The issues raised by the government's lack of candor and misbehavior are not at all "fact-bound."

Point III

The government's lack of candor throughout this case has deprived petitioner of due process of law and should be condemned in the exercise of this Court's supervisory powers over the administration of the federal criminal justice system.

In opposing Samuel Wright's petition, the government is studiedly indifferent to the deficiencies in its behavior found by the Court of Appeals.The Solicitor General does not deign to address directly or express any chagrin or regret over Thomas Puccio's conflict of interest in presenting the case to the grand jury, the perfunctory nature of the investigation conducted by the Justice Department's Office of Professional Responsibility and the government's incomplete and misleading presentation of the facts at trial and on appeal. The government shows no awareness or concern over

the awful likelihood that the case is not only symptomatic, but representative of prosecutorial indifference or obtuseness to ethical and legal standards which should guide and control the conduct of federal prosecutors.

The government's brief handles the issue of misconduct obliquely. A footnote, n. 4, p. 4, refers to the government's repeated submissions to the Court of Appeals seeking "correction" of its opinion. These appear to be essentially plaints of David Trager, the former United States Attorney, much of whose conduct is central to this case. The Solicitor General stays above the fray, stating somewhat equivocally, n. 4 at p. 4:

> "We do not necessarily agree with the Court's characterization of the record in this case. The government's position is set forth in its submissions to the court of appeals to correct the opinion. (Copies of these papers are being provided to counsel for petitioner

> and lodged with the Clerk of this Court.) Although the court of appeals modified its opinion in certain respects in response to these submissions, in our view the opinion still is not entirely accurate in reflecting the disputed documentary record ..."

The Solicitor General's submissions include a letter dated May 11, 1984, from the United States Attorney to the Clerk of Court taking issue with the Court's failure to correct misstatements of fact relating to the issue of the role of Mrs. Puccio in petitioner's prosecution. There is a hand-written note in the upper left-hand corner of the first page of this letter which reads: "Court refused to accept this further submission." This note is unsigned and undated and the author is not identified.

As is true of so much of the government's conduct in this case, the note is true as far as it goes, but misleading in a way that is self-serving. What

actually happened is that the Clerk of the Court wrote in reply on June 6, 1984, advising the government that the panel consisting of Chief Judge Feinberg, Judges Friendly and Pratt had instructed her to return the letter "which it regards as repetitive, untimely, and without substantive merit." We have lodged a copy of this letter with the Clerk of the Court and are attaching a copy to this reply brief, R. App. 1.

As the petition points out, David Trager used Attorney General Bell's letter to misdescribe the Justice Department's perfunctory investigation as a "complete review" and to laud the thoroughness and professionalism of the U.S. Attorney's investigation. This technique spared Mr. Trager from himself having to misstate the nature of the inquiry undertaken by the Office of Professional Re-

sponsibility. Pet. p. 25. By relying on the submissions that the government made in the Court of Appeals, the Solicitor General similarly spares himself from having to make any representations of fact or to inform this Court fully and fairly of the action taken by the Court of Appeals in returning the government's last submission.

The government's prosecutorial judgments in this case have been consistently warped against petitioner. After years of investigation by a slew of agencies, petitioner was finally prosecuted for the receipt of a $5,000 honorarium, and this only after prosecution for receipt of this honorarium had been declined by the Assistant United States Attorney who had presented charges against petitioner to a grand jury for a year and a half.

The government's conduct in this

case from beginning to end has deprived petitioner of due process of law and merits condemnation in the exercise of this Court's supervisory power over the administration of criminal justice in the federal judicial system.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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December 27, 1984

R. App. 1

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

Elaine B. Goldsmith
Clerk

June 6, 1984

L. Kevin Sheridan, Esq.
Executive Assistant
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Re: Samuel D. Wright v. United States
Docket No. 83-2150

Dear Mr. Sheridan:

Your letter of May 11, 1984, has been transmitted to the panel, consisting of Chief Judge Feinberg, Judges Friendly and Pratt. The panel has instructed me to return your letter, which it regards as repetitive, untimely, and without substantive merit.

Very truly yours,

s/ Elaine B. Goldsmith

Elaine B. Goldsmith,
Clerk

EBG:is

cc: Ramsey Clark, Esq.
Lawrence W. Schilling, Esq.
David S. Golub, Esq.